



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Rut's Moving & Delivery Service Inc.  
File: B-228406  
Date: February 11, 1988

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### DIGEST

Protest that agency deprived incumbent contractor of opportunity to bid because agency did not provide it with a copy of the solicitation is denied where record shows that although agency improperly failed to solicit the incumbent, otherwise reasonable efforts were made to publicize and distribute the solicitation and three proposals were received.

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### DECISION

Rut's Moving & Delivery Service Inc. (Ruts) protests any award of a contract under request for proposals (RFP) No. F11623-87-R-0051, issued by the Department of the Air Force, Scott Air Force Base, Illinois, for packing and crating services for the period from January 1 to September 30, 1988. Ruts complains that, even though it was an incumbent contractor, the agency failed to provide it with a copy of the solicitation prior to the closing date for receipt of proposals, preventing it from competing under the solicitation.

We deny the protest.

The requirement, as synopsisized in the Commerce Business Daily (CBD) on July 30, 1987, had September 17 as the closing date for receipt of proposals. However, the solicitation as issued on August 26 actually had a closing date of September 25. Notices of the solicitation also were posted in the base contracting office and sent for posting to the United States post offices in Belleville, Illinois, and St. Louis, Missouri, and the Procurement Assistance Center at Southern Illinois University in Edwardsville, Illinois.

The RFP solicited packing and crating services for three geographic areas. Within each geographic area, services were divided between three schedules: Schedule I, Outbound Services; Schedule II, Inbound Services; and Schedule III,

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Intra-City and Intra-Area Moves. Award was to be made to the lowest priced, acceptable offeror by area under each of the specified schedules. The RFP also notified offerors that offers would be evaluated on the basis of advantages and disadvantages to the government that might result from making multiple awards.

Eleven firms were sent solicitation packages by the Air Force. Six of these firms were from the previous bidder's list. Four proposals were received in response to the RFP and are currently being evaluated. Three of the four proposals are for the area in which Ruts is the incumbent.

Ruts, the incumbent contractor for Area I, Schedule III, was left off the new mailing list and, as a result, was not sent a solicitation package.<sup>1/</sup> Ruts was the only firm from the prior mailing list which was not included on the new list. The Air Force claims that this omission was inadvertent. According to Ruts, it did not become aware of the new solicitation until October 1, 6 days after the closing date for receipt of proposals. Ruts filed a protest with our Office on October 5, requesting that the RFP be canceled and resolicited so that it may compete for the contract.

We first address the timeliness issue raised by the Air Force. Under our Bid Protest Regulations, a protest must be filed--defined as received at our Office--within 10 working days of when the basis for it is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1987). The agency contends that the 10 working day filing period for Ruts' protest commenced on September 17, the date listed in the CBD synopsis as the closing date for receipt of proposals, because Ruts should have known by then that it had not been solicited. Since Ruts' protest did not reach our Office until October 5, the Air Force contends that its protest is untimely since it was filed beyond the 10-day deadline.

We disagree with the Air Force and find Ruts' protest timely. We think it illogical to conclude that Ruts' protest had to be filed within 10 days of September 17, the CBD's announced closing date, in order to be timely since the RFP in fact was issued with a closing date of September 25. Further, the facts conflict on whether Ruts should be charged with knowledge that the RFP was issued in

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<sup>1/</sup> Ruts was the incumbent contractor for Area I, Schedule III, for the contract period covering July 24 to December 31, 1987. Ruts had performed on an interim basis from January 1 to July 24 under an extension of its 1986 contract. Ruts had been the contractor for Area I, Schedule III during the calendar years 1983, 1984, and 1986.

August with an actual closing date of September 25. The president of Ruts states that she met with the contracting officer on July 21, 1987, to sign the contract for the period July 24 to December 31, but no mention was made of the new solicitation at this meeting even though it occurred just 9 days before the new solicitation was synopsized in the CBD. The protester adds that "[t]his was the first time since we have been doing business at the Base, that no one in the Transportation Office said anything at all about [a] new contract." Ruts also argues that the issuance of the new 1988 solicitation was out of the "normal [chronological] pattern" for this requirement and, therefore, the protester was not expecting the 1988 solicitation to be issued in August 1987. Ruts claims that it did not become aware of the new solicitation until October 1 in a telephone conversation with one of the other incumbent contractors. The agency report indicates that copies of the CBD notice were posted in the base contracting office but does not indicate if these notices were up at the time Ruts' president visited there on July 21.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. Here, we think Ruts has provided sufficient evidence to support its version of the facts that it did not know or have reason to know prior to October 1 that a new solicitation had been issued. Also, even if we were to charge Ruts with knowledge of the September 25 closing date, its protest reached our Office on October 5, within 10 working days of September 25. We, thus, find Ruts' protest timely and will consider it on the merits.

Ruts argues that it was intentionally omitted from the bidder's mailing list. Ruts bases this allegation on what it believes to be a "series of events over the past year and a half" which display "a pattern of neglectful conduct" by the agency and which it chronicles in its comments on the agency report.

Although the Air Force admits that Ruts was left off the new bidder's mailing list and was not sent a solicitation package, it argues that this omission was inadvertent. In any event, the Air Force argues, Ruts should have been on notice of the procurement through the CBD synopsis. The Air Force concludes by stating that the burden was on the protester to ensure it received the solicitation materials and to submit its proposal in a timely manner.

The Competition in Contracting Act of 1984 (CICA) places a duty on contracting agencies to take positive, effective

steps toward assuring that all responsible sources are permitted to compete. Agencies are required when procuring property or services to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." Id. §§ 259(c) and 403(7). The term has been further explained in the legislative history of CICA as meaning "all qualified vendors are allowed and encouraged to submit offers . . . and a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost." H.R. Rep. No. 98-1157, 98th Cong., 2d. Sess. 17 (1984). We have said that in view of the clear intent of Congress to make full and open competition the standard for conducting government procurements, we will give careful scrutiny to an allegation that potential bidders have not been provided an opportunity to compete for a particular contract. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

In so doing, we will consider that the agency has met its obligation if it can show that it made a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains reasonable prices. Keener Mfg. Co., B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. While significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation will result in our sustaining a protest, see Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 CPD ¶ 496, the fact that inadvertent mistakes occur in this process will not in all cases be grounds for disturbing the procurement. See NRC Data Systems, 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84. Whether an agency's efforts in this regard are sufficient, thus, depends upon the facts and circumstances of each case.

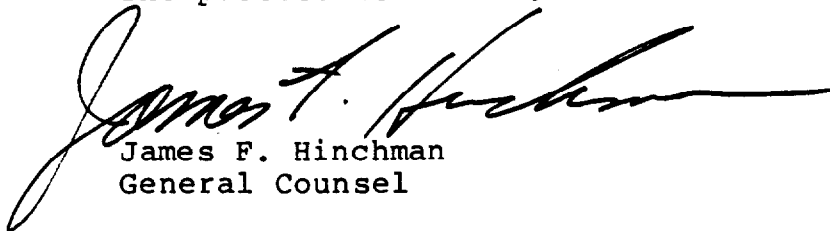
Where, as here, a contracting agency has properly synopsisized the proposed procurement in the CBD, a potential contractor, including an incumbent such as Ruts, is on constructive notice of the solicitation and its contents and has a duty to make reasonable efforts to obtain copies of the solicitation in order to ensure that it is included in the competition. See, e.g., G&L Oxygen and Medical Supply Services, B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78. Ruts did not make use of the CBD. However, as we pointed out in a recent case with a similar fact pattern, Abel Converting Company, B-229065, Jan. 15, 1988, 67 Comp. Gen. \_\_\_, 87-2 CPD ¶ \_\_\_, contracting agencies also have a duty, stemming from the Federal Acquisition Regulation, to solicit their

satisfactorily performing incumbent contractors. See FAR §§ 14.203-1, 14.205-1, 14.205-4 (FAC 84-11). In Abel, as here, the agency failed to include the incumbent contractor in its solicitation mailing list and, thus, did not solicit the incumbent. However, there the agency only received one bid on several of the items. We recommended a resolicitation on the basis that the agency's failure to solicit the incumbent contributed to the lack of competition for those items.

We think the circumstances of this case are distinguishable. We note that for the most part, the Air Force did fulfill its obligation to publicize this procurement: it posted copies of the solicitation; had a synopsis published in the CBD; and mailed copies to 11 firms on its mailing list. Nevertheless, it did fail to assure that an incumbent contractor--Ruts--was provided with a copy of the solicitation, which it should have done, although the record does not support Ruts' assertion that this omission was deliberate. The relevant inquiry then becomes what effect this omission had on the adequacy of the competition which was obtained. .

Here, unlike the situation in Abel, where competition was not received, the Air Force received three offers covering the area in which Ruts was the incumbent. We have found this sufficient, in prior cases, to satisfy the full and open competition requirement so as to assure reasonable prices. See, e.g., NRC Data Systems, 65 Comp. Gen. at 738, 86-2 CPD ¶ 84 at 4. The Air Force's failure to send Ruts a copy of the solicitation, therefore, did not result in a lack of competition. For that reason, we do not think it appropriate to disturb the procurement process by recommending that the requirement be resolicited.

The protest is denied.



James F. Hinchman  
General Counsel